

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1150

To be argued by
PETER FLEMING JR.

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1150

UNITED STATES OF AMERICA,

Appellee,

—v.—

AMREP CORPORATION, RIO RANCHO ESTATES,
INC., ATC REALTY CORPORATION, HOWARD
W. FRIEDMAN, CHESTER CARITY, HENRY L.
HOFFMAN, and DANIEL FRIEDMAN,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS CHESTER CARITY AND DANIEL FRIEDMAN

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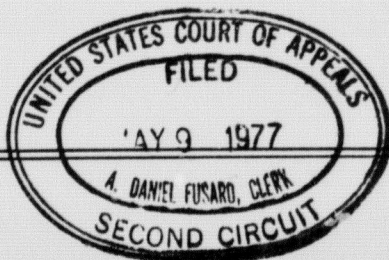


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**BRIEF FOR DEFENDANTS CHESTER CARITY
AND DANIEL FRIEDMAN**

Preliminary Statement

Chester Carity and Daniel Friedman appeal from judgments of conviction entered on March 10, 1977, after trial before the Honorable Charles M. Metzner and a jury. In addition to the points raised in this brief, they also join in the points raised in the brief filed for the other defendants, which have not been repeated here since counsel have divided labor for purposes of the appeal so as not to burden the Court with unnecessary repetition.

Indictment 76 Cr. 644, a superseding indictment, was filed on July 13, 1976. It charged mail fraud and land fraud in the sale over fifteen years of subdivided land in a community development at Rio Rancho, New Mexico. Each defendant was convicted on the twenty-five (25) counts which were submitted to the jury. The individual

defendants were sentenced to six (6) months imprisonment.

Statement of Facts

Rio Rancho Estates is a subdivided community development of 91,000 contiguous acres located on the west side of the Rio Grande River, a few miles northwest of Albuquerque, New Mexico. 55,000 acres were purchased in 1961. The additional 36,000 acres were purchased between 1969 and 1971 (DX CK; A. 10807, 945, 1000, 1987).*

The 91,000 acres constitute probably the choicest land of any size within reasonable distance of Albuquerque. It is not rock-face or swampland or desert.

The land was prepared for community development as soon as it was purchased. Engineered subdivision eliminated acreage not fit for residence. Bladed caliche roads were cut over its entire area. The adequacy of water and other necessities was assured. Over the fifteen year indictment period, more than \$60 million was invested in development and improvement of the land and the community.

Of the 91,000 acres, only 56,000 were offered for sale. The balance was consumed by units reserved for clustered residential development, and by common facilities such as roads, a modern shopping center and business complex, medical facilities, a post office, a \$1.2 million sewage treatment plant, churches, community centers, and a golf course. Rio Rancho's national administrative headquarters moved to a new office building on the property in 1969 (A. 4301-02, 6341-42, 6493, 6926, 3618-20).

The quality of Rio Rancho's community development was never contested at the trial. Its sewage treat-

* References "A" are to the pages of the appendix, "GX" to a government exhibit, "DX" to a defense exhibit.

ment plant is the finest in New Mexico. Its golf course is regarded as one of the finest in the Southwest. More industry has located in Rio Rancho's industrial park than in any other single area in or adjacent to Albuquerque. The Order of the Felician Sisters built its regional motherhouse at Rio Rancho. The community has received a number of awards from national institutions (GX 70, DX BR, A. 1290, 3618-20, 6493, 7170).

Rio Rancho presently is New Mexico's fastest growing community. Some 7,000 persons live there (A. 3618, 3634-35). Every resident who was called as a witness, whether by the prosecution or by the defense, agreed that Rio Rancho was a fine place to live (see, *e.g.*, A. 4009-11, 6791-92, 6805).

The short of the matter is that Rio Rancho has become perhaps the best community development of its kind in the United States. We direct the Court's attention to the many close-up photographs of the community, including the undeveloped acreage (DX FT, FU-HA, HB, HC, HD, HE).

The 56,000 acres which were offered for sale were subdivided for residential and commercial use. The residential acreage was divided almost entirely into one-half acre residential lots. In addition, ranchettes of five acres or more were offered for sale.

Throughout the fifteen years covered by the indictment the terms of sale remained essentially the same.

A. The Exchange Right

The price of a residential lot included the cost of access to water, electricity and telephone service. Since it was economically unfeasible to provide these services before they were needed, the right of exchange was an integral part of every contract for residential lots.

All of Rio Rancho's acreage was divided into units of contiguous land. Selected units were reserved for clustered home development, and utilities and water were provided to those units as required. Virtually all residential lots thereafter were sold as raw land, but purchasers received the contractual right to exchange their undeveloped lot for a developed lot of comparable value if, when the purchasers decided to move to Rio Rancho, water and utilities had not yet reached their lot (A. 10159). For example, a purchaser could buy an undeveloped residential lot in Unit 25. If utilities had not reached that lot when the purchaser decided to move and build, the lot in Unit 25 would be accepted in exchange for a lot of comparable value in a unit where a clustered community was developing, and where water and utilities were in place.

The exchange right avoided the need for capital investment in excess of actual need. It also guaranteed a planned and orderly community development. It gave every purchaser immediate access to water and utilities whenever a decision to move was made. The purchasers all knew they were buying undeveloped land subject to the promise of exchange (see, *e.g.*, A. 392-94, 426-27, 1088-92, 1585, 2280, 2398, 2430-31, 2578-80, 2623, 2652-53, 2682-83, 2800, 2919, 2950, 5355-56, 5370). The promise was never broken. To avoid unnecessary delay in relocation, Rio Rancho consistently prepared lots for construction in advance of actual demand. 1,000 new lots were cleared and ready for building at the time of the trial (A. 3640-41).

B. The Cancellation Right

All purchasers of residential lots received the absolute contractual right to cancel the purchase without cause if, upon inspection of Rio Rancho and their specific property, cancellation was requested. The cancellation right,

which included full refund of all monies, required inspection and cancellation within six months of purchase (A. 1285-87, 3605-06). Transportation to Albuquerque was at the purchaser's expense. But ground costs of what usually was a five-day visit were paid by Rio Rancho, charter flights were arranged at reduced airfare, and, if the purchaser did not cancel, approximately up to 70% of the purchaser's transportation expense was applied against the unpaid balance of his purchase price (A. 1315-17, 3612).

The purchasers who took the trip saw Rio Rancho as a whole, stood on their own property, saw the relationship between their property and the developed areas of Rio Rancho, saw also the relationship between Rio Rancho and Albuquerque itself, and, finally, were free to travel to and in Albuquerque, and to speak with realtors in Albuquerque, residents of Rio Rancho, or anyone else (A. 555-560, 619-622, 1094-96, 1286-89, 1509-11, 1691-95, 2404-05, 5387-89, 5393-94, 5697-98).

Every purchaser who took the trip was able to compare what he had been shown, told, or visualized at the time of his purchase, with reality itself. Of the purchasers who testified, more than 70% exercised this privilege, visited Rio Rancho, and did not cancel (see, *e.g.*, DX P; A. 10804, DX BU; A. 10805, DX CA; A. 10806). All of these purchasers, whether called by the prosecution or defense, agreed that Rio Rancho, and their land at Rio Rancho, was exactly what they had been led to believe it would be (see, *e.g.*, A. 650-51, 1508-21, 4007-10, 6328, 6795-96).

C. The Contract Itself

The basic purchase contract was one page, front and back (GX 126a; A. 10137, GX 141a; A. 10158, A. 10161). It identified the exact lot or lots, exact location, exact purchase price, terms (monthly payments over seven years), interest due, and total of price plus interest.

The terms of the cancellation privilege and of the exchange right were set forth. The purchaser also was warned in writing that the terms of the contract could not be modified by oral representations. Each purchaser initialed the contract to acknowledge receipt of any property reports or offering statements required by federal or state law. Each purchaser also signed the contract and, in most cases, husbands and wives both signed.

D. The Property Reports

As the applicable state or federal law required, property reports and offering statements were provided. New Jersey, for example, required such reports as early as 1965. Its report specifically stated (DX DN; A. 10838):

"VALUE—PRESENT & RESALE: No attempt has been made to evaluate the offered lands; however, the prospective purchaser is advised that these are speculative lands and that value will depend on growth in the area. It is unreasonable to expect to sell undeveloped lands at a profit or without loss until and unless the area develops."

New York required property reports as early as 1961 and, beginning in 1969, required the following statement in its reports (DX CK; A. 10807):

"Lots may also be purchased for speculative purposes but such purchasers are advised that resale for a profit may be difficult for a number of years in view of the fact that water and utilities may not be available to certain lots for an indefinite number of years; that a percentage of the purchase price paid is included therein for use in advertising and development; and that in trying to make a resale the purchasers may be competing with the Company, which has thousands of lots to sell."

The federal government did not require a property report until 1969. Unlike New Jersey and New York, the federal government did not require any recitation as to liquidity or resale (DX JW; A. 10912).

E. The Dinner Parties

The evidence concentrated upon sales at dinner parties which began in 1965 and which, thereafter, provided the basic vehicle of sale (A. 752, 781).

Some 12,000 dinners were organized yearly (A. 1333). Invitation lists were compiled independently by Reuben Donnelly, Inc. under AMREP's instruction that invitees should be limited to persons of at least middle income (A. 627, 3304, 3306). The invitations stated that the dinners were for the purpose of selling land in New Mexico at Rio Rancho. Approximately 0.5% of those invited actually attended the dinners. Of those who did come, approximately 10% purchased property (GX 361, A. 1109-10).

Dinners ordinarily began at 7:00 P.M. Usually at least two couples were seated at each table, together with one salesman. At 7:30 P.M., the dinner manager, a salesman, introduced the program. Two films were shown. The first, entitled "West Side Story", was produced by Albuquerque's West Side Association, a group of civic leaders who believed that the future of Albuquerque would be realized west of the Rio Grande. The film dealt with the present and future development of that area and gave attention to Rio Rancho. The second film, entitled "Your Golden Future", was produced by AMREP and dealt essentially with Rio Rancho as a growing community where people could live or retire. After the films, the major sales presentation was made from the podium. Running for approximately 20 minutes, the presentation said that Rio Rancho was a good place to live or retire and that the purchase of Rio Rancho land also was a good

financial investment. A copy of the standard oral presentation is included in the Exhibit Appendix (GX 671; A. 10547).

Actual attempts to sell land began after the films and oral presentation. Allocation lists of property were available at each dinner which usually listed 10-15 identified lots. Only listed lots could be sold at a particular dinner. The purpose of this restriction, and of the allocation lists, was to avoid the unlawful sale of the *same* lot to different purchasers at *different* dinners (A. 935-37, 3587-88).

A system of "holds" also was employed to avoid the sale of the *same* lot to two customers at the *same* dinner (A. 936-39). Immediately after the podium presentation, salesmen would call a "hold" on a particular lot or lots appearing on the allocation list. While the prosecution urged that this use of "holds" was designed to create a false impression of panic buying, in fact virtually all of the purchaser-witnesses understood that the purpose of the "holds" was to avoid duplicate sales at the same dinner, and did not evidence actual purchases or anything more than a "hold" on a particular item of land for the purpose of attempting to sell it (see, *e.g.*, A. 1724-25, 2238-39).

After establishing a "hold," the salesman attempted a sale to a person or couple. A number of purchaser-witnesses said that their particular salesman made certain private representations which exceeded whatever representations had been made in the films and general sales presentation. There was no evidence that these private representations were authorized by or known to AMREP or any of the individual defendants. Indeed, it was established through examination of the various prosecution witnesses that these private representations violated a corporate policy of standardized presentation from which there should be no deviation (see, *e.g.*, A. 827, 861, 966, 947, 2397, 3471-73, 3582).

F. State Regulation

All advertising, promotional literature, and films were submitted to the New York Department of State for review as to "form, language and content", and for a determination of whether they violated New York Real Property Law Article 9A, which prohibits misrepresentations. No sales materials were used without Department of State permission after review (A. 828, 1294-95, 1495-96, 2396, 3555-57, 3562-64).

State review and approval was based in part upon the Department of State's periodic on-site inspections of Rio Rancho (A. 3565). Changes in the nature and content of the promotional material were required from time to time (A. 3557-58). Additionally, state investigators made unannounced appearances at dinner parties to monitor the presentation and procedures (A. 1082-83, 2042-43, 3540).

G. The Prosecution's Theory of Fraud

The prosecution agreed that Rio Rancho was a good place to live (A. 6309-10). It conceded the quality of Rio Rancho's development, did not contest AMREP's continued capital investment in the Rio Rancho community, and never challenged the adequacy of water and other necessities or the validity of the exchange and cancellation rights. Strangely, in a case which charged pervasive fraud over 15 years, the prosecution specifically excluded from its "class" of alleged defrauded purchasers those who had bought a single residential lot with the intention to relocate. The undisputed evidence was that 57% of all purchasers in fact purchased only a single residential lot, and that an additional 27% purchased only two residential lots (GX 887).

The prosecution nonetheless argued that the sale of Rio Rancho land was a fraud from the outset. The scheme,

as finally presented to the jury, allegedly was to defraud purchasers by misrepresenting (a), that Albuquerque could only grow to its northwest in the direction of Rio Rancho, and (b), that Rio Rancho land was a good investment as well as a good place to live or retire.

H. Growth to the Northwest

The evidence on this issue was largely uncontested. It was agreed that Albuquerque was experiencing an enormous population explosion when Rio Rancho was purchased in 1961. It had grown from a town of 35,000 in 1945 to a city of over 210,000 by 1960. By the middle 1960's, every supposedly informed source, without exception, was predicting an area population by 1985 of between 640,000 and 820,000 (GX 41, p. 47, GX 60, pp. 4-8, A. 4620).

Albuquerque was originally settled on the east side of the Rio Grande River. As it grew, its expansion had been to the east away from the river towards the Sandia Mountain range. By the early 1960's the city had reached the Sandia Mountain foothills (GX 60, p. 20).

Future expansion concededly was constrained by certain natural and political barriers. The mountains blocked any material expansion to the east. Indian lands, plus an abandoned and essentially unusable property, North Albuquerque Acres,* limited growth to the northeast. Further expansion to the southeast and to the south was blocked by Kirtland Air Force Base, other federal

* North Albuquerque Acres was a contiguous land mass which ran from east of the Rio Grande River due east to the mountains. Purchased by speculators in the early 1920's the property had been subdivided without regard to arroyos, flood plains, and other impediments. Its plots were sold, and the speculators departed. Physical problems, and the confusion created by its large number of widely scattered ownership interests, had thereafter effectively blocked its development (A. 4674-77, 4680-81, 4888-90, 6953-54, 7200; GX 49, p. 29).

properties, state land deeded to the University of New Mexico, and the Isleta Indian Pueblo (A. 4731-33, 6483-87, 6953-65, 7165-68, DX EM, p. 14, GX 41, p. 24).

Substantial undeveloped land which lay across the Rio Grande River to the west faced other problems. Much of the land west of the river was part of an ancient land grant to the heirs of the Atrisco family. Title problems had plagued the Atrisco Grant since Albuquerque's beginning. The vast Atrisco property had not been developed to any material degree by 1960, and was considered essentially undevelopable unless title were cleared.*

Vacant land to the southwest faced similar title problems. Comprising another ancient land grant, the Pajarita Grant, this acreage remains unavailable for development even to this moment, and, further, was and is undesirable in any event because of various sociological considerations (A. 4668, 4670).

There existed, however, a narrow, triangular piece of usable land running from the west side of the Rio Grande River at Albuquerque's city limits, north and northwest between the river and what is called the volcanic escarpment. The point of the triangle abutted the river at Albuquerque. The top of the triangle opened on to Rio Rancho (A. 6479-80, 6599-6600, GX 1075, DX EM, p. 14, GX 41, pp. 22, 24).

In 1963, a former Albuquerque city planner, Jose Yguado, published a monograph which, after discussing the above factors, concluded that Albuquerque's only path of real expansion was through this northwest triangle. Yguado wrote (X EK; A. 10875):

* These title problems persisted even at the time of the trial in 1976. Title insurance remained unavailable for Atrisco land, and, while a lawsuit had been commenced in July 1976 to settle title in the Grant, a major prosecution witness, Carruthers, a past and present city planning commissioner, admitted on cross-examination that he would be unwilling to "bet" on the outcome of that legal action. (A. 4668-70, 7177-80).

"The major consideration then is in which direction is this expansion most feasible. The city limits to the east have been expanded as far as possible to the Sandia foothills; to the south, the military bases and Indian lands are limiting to extensive expansion; to the north, except for some developable land in the Elena Gallegos Grant, the Sandia Pueblo is a definite limit to northeastern expansion.

These imposed limits to the east, north, and south leave no alternative to expansion to the west. It is reasonable to assume that any major expansion of the city to accommodate necessary growth and development in the ensuing years shall be to the northwest mesa area."

In 1965, a black and white film entitled "West Side Story" was produced by Albuquerque's West Side Association. The film, which was reproduced in color in 1967, predicted that 300,000 people were expected to live west of the Rio Grande River by 1985. The film specifically pointed to the new subdivided developments west of the river, one of which was Rio Rancho, and all of which were located in the northwest triangle which opened on Rio Rancho. The film began with the following statement (GX 70):

"In 1967, one of the most dramatic things going on in our city today is the expansion and growth of Albuquerque's beautiful west side. Albuquerque has enjoyed an experience of one of the most remarkable growth rates of any city in the United States.

The west side holds the key to Albuquerque's future. Blocked by mountains to the east, reserve land to the north and south, Albuquerque has already started its expansion to the west where it has great opportunities for industrial development.

A metropolitan traffic survey predicts the population of the west side will total 300,000 by 1985.

This means an influx of nearly a quarter of a million people on the west side, almost equal to the present population within the city, and where will they go? Into spacious new subdivisions with paved streets, schools, professionally landscaped. At least five of these subdivisions on the west mesa have been master planned."

Richard Vaughn, Albuquerque's City Planning Commissioner, was pictured in the film. Mr. Vaughn said (GX 70):

"As the city planning commissioner and a resident of the west side, I am optimistic about Albuquerque's growth and I feel very strongly that the key to Albuquerque's future lies in the development of the west side."

In this context, the defendants, in 1965, began for the first time to state to potential purchasers that Albuquerque, because of the various constraints described above, was destined to grow to the northwest, through the triangle to Rio Rancho.

The growth statement was made in various words in various sales material. The film "West Side Story" became a part of the standard dinner party presentation. A basic brochure, entitled "This Is My Land" (GX 384; A. 10374), spoke of "the future", and said that Albuquerque's future growth was "predetermined." The major dinner party speech, after describing the constraints, used similar words, but, in places, also said that Albuquerque could "only" grow to the northwest to Rio Rancho.

The prosecution's claim of fraud was based entirely upon this use of the word "only", in the dinner party speech. Its basis for claiming falsity was that in 1965 there still was some room for residential development in other areas of Albuquerque. By the end of the trial, this

claim of "other" land was limited essentially to unused land in Albuquerque's *northeast* quadrant.

We do not misstate the prosecution's position. In its rebuttal summation, the prosecutor said (A. 7902):

"We are using the word 'only' because the defendants used the word 'only' in selling this land, and that was a material fact in the decision for these people to buy land.

Were they going out telling their customers that there is still more land in the northeast, and it is only when the northeast is filled, and it is only eventually that the northwest will take the growth, it is only eventually that it may come to Rio Rancho."

In support of this limited claim of falsity, the prosecutor produced two witnesses to testify to opinions which they had held in 1964 and 1966 as to the manner in which the expected population explosion would be absorbed. Ironically, by their own admission, the evidence proved that the predictions of both of these witnesses had turned out to be dead wrong.

Carruthers, an Albuquerque city planner, identified a Land Use Plan which predicted in 1964 that the expected population increase of between 400,000-600,000 by 1985 could be absorbed almost entirely by further development of northeast Albuquerque, by an increase in historic population density, and by in-fill of inner city vacant land (A. 4494, GX 60, GX 41).

Avellanet, a Denver marketing consultant, testified to a report which he had prepared for Rio Rancho in 1966 which predicted that Albuquerque's population would be 600,000 in 1985, and that this tripling of 1966 population could be absorbed entirely in the northeast quadrant (GX 66, p. 40).

Carruthers and Avellant both were wrong. By 1976, development of the northeast quadrant, as Carruthers admitted, had "gone about as far as it could go" (A. 4679), but had absorbed less than 70,000 additional people, instead of the 400,000 or more which Carruthers and Avellant originally had thought it could hold. And, contrary to Carruthers' other 1964 projections, urban in-fill had not occurred, and population density, rather than doubling, had decreased. Albuquerque's traditional western style of living simply had not changed (A. 4710-15, 4724).

The population explosion, which everyone had expected in 1964, had not materialized by the time of the trial. But if that unanimous expectation had been realized, the evidence left little question that the anticipated influx of population into the northwest triangle, as projected by Yguado, the West Side Association, and the defendants, would have occurred.

I. Good Investment

The prosecution said that the defendants also committed fraud by stating that Rio Rancho land was a "good investment" which could be expected to appreciate in value, as well as a good place to live or retire.

In fact, the value of Rio Rancho land did appreciate throughout its fifteen year existence. Carruthers agreed that land values throughout the Albuquerque area had appreciated substantially since 1965. The other qualified witnesses, Pierce, another public planner, Graham, the president of one of Albuquerque's leading banks, Yguado, already identified, and Olquin, an Albuquerque realtor, all agreed. Olquin testified that raw, undeveloped land in Corrales, just one mile from Rio Rancho, had increased in price from \$5,000 an acre in 1974 to \$6,500 an acre in 1976, with no exchange right for developed land such as existed at Rio Rancho (A. 4715-16, 6472-80, 6585, 6983-84, 5170).

Appreciation was evidenced in other ways. County real estate taxes on both raw and developed Rio Rancho land increased materially between 1961 and 1976. One local bank, which in 1961 would not provide mortgage money, by 1976 had invested more than \$14 million in new home mortgages in amounts up to 95% of construction cost (A. 6475-77). In 1976, the same bank, Albuquerque Federal Savings and Loan, which was one of the city's major real estate investors, began to invest principally in the northwest triangle leading to Rio Rancho. Taylor Ranch, the bank's first northwest venture, has been successful beyond its most optimistic projections (A. 6481-82, 6490). It is located only 2 miles south of Rio Rancho. The FHA, which would not give appraisals on Rio Rancho land in the early 1960's, by 1975 was appraising developed building lots at \$5,400, a price substantially above Rio Rancho's price for land which, while undeveloped, could be exchanged without cost for a developed lot like those subject to FHA's present appraisals (GX 663, A. 4046, 4057-60, 4082-94).

Further, Mols, a prosecution witness, who moved to Rio Rancho in 1970, sold an undeveloped residential lot in 1973 for double his purchase price (A. 3902-04).

Mellenbrook, a defense witness, moved to Rio Rancho in 1971. In 1973, she placed a "For Sale" sign on her other land holdings and realized a 100% profit. She then lent her sign to a neighbor who repeated Mellenbrook's success (A. 6920-25).

Bonavisa, a prosecution witness, never moved. In 1975, as her husband was about to close a sale in New York at a 50% profit, the indictment was announced (A. 2790-91).

James, a prosecution witness, moved to Rio Rancho in 1972. One year later she was fired from Rio Rancho

employment for theft. She sold her \$28,000 home and lot for in excess of \$40,000 (A. 3824-25).

Kearney, a defense witness, moved to Rio Rancho in 1969. He was divorced in 1974. His home and lot, for which he had paid \$22,000, was appraised for marital settlement purposes at \$40,000 (A. 6330-31).

Frappier, a defense witness, moved to Rio Rancho in 1972. His home and lot, with improvements, cost \$45,000. He intends to move to a larger home at Rio Rancho and has offered his present home for sale at \$86,000. It had not been sold at the time of his testimony. He had received an offer, however, and expected a sale near his offering price (A. 6434-35, 6442).

The prosecution claimed that Rio Rancho land was not a "good investment" for the single reason that a general resale market had not developed by the 1970's. It was the prosecution's contention that this absence of general liquidity established that Rio Rancho land was a bad investment, even if its inherent value had appreciated substantially.

To support this claim, the prosecution proved that certain unidentified purchasers had been unable to sell their land by placing it with a multiple-listing service operated by the Albuquerque Board of Realtors. Specifically, the evidence was that 690 purchasers attempted to sell land through multiple-listing between 1971 and 1973, and that only 20 were successful. This evidence was based upon the hearsay testimony of a realtor, Williams, who was unable to provide any information as to the offering price of the unsold lots, or as to the price at which the 20 lots were sold (A. 5224-25, 5251-54, 5274-75).

The prosecution also introduced evidence of a land auction sponsored in 1975 by a company called Rocky Mountain Land Auction Company. The auction was held in Albuquerque approximately three months before the indictment was returned and some time after the Federal Trade Commission had filed a well-publicized civil fraud complaint against AMREP and Rio Rancho. Owners were solicited by Rocky Mountain and some 1,400 lots were offered for sale at unknown prices. 33 lots were sold, principally to local Albuquerque builders who then turned a profit by exercising the exchange right and building homes for sale. Sales prices at the auction ranged from \$500 to \$900 per residential lot (A. 5136-53, 5162-63, 5167-68, 5189-90).

The prosecution offered no other evidence to establish that the purchase of Rio Rancho land was a bad investment. The only actual loss which was proved was of two purchasers, at least one of whom originally purchased for relocation, changed her mind, and sold at the distress auction (A. 5327-28, 5387-90).

There was no evidence of inevitable loss. No appraiser or other expert testified that Rio Rancho land was a bad investment without long-term value.

Finally, the claim that relatively short-term illiquidity evidenced a bad investment was contrary to the opinion of both the States of New Jersey and New York, each of which permitted use of the "good investment" theme while at the same time requiring written disclaimers of a liquid and ready resale market (A. 10838, 10809).

J. Bad Faith

There was no evidence that the defendants did not honestly believe what they said about growth and investment value. There was no evidence that their statements

and predictions were without basis in fact so as to evidence bad faith. The evidence already recited provided substantial historical and factual basis for both of the statements.

K. Evidence of Uncommon Conduct

The prosecution also introduced massive evidence of idiosyncratic and isolated sales conduct which was not alleged to have been common to the scheme alleged, and which was not proved to have been suggested, authorized, or approved by AMREP or any of the individual defendants. Indeed, much of it was specifically prohibited by AMREP policy.

There was evidence that on one occasion, at Rio Rancho, an ATC sales manager, Geller, ordered the destruction of Albuquerque newspapers which supposedly contained adverse publicity (A. 2363-64).

One salesman said he was instructed, again by Geller, to hide property reports under sugar bowls (A. 2193-95).

Henry said she was told by salesmen at Rio Rancho, and at some but not all the many dinner parties she attended, that Rio Rancho would institute a resale program (A. 426-27, 431, 436, 464).

Seder testified he was promised at dinner that he could double his money in real estate in a short while, and was told at Rio Rancho that his undeveloped lot would have utilities in a few years (A. 1549, 1585).

Finnen said he was told that Rio Rancho Estates would be sold out in three years (A. 1627-28).

Dewitt said she was told utilities were being put in all over Rio Rancho and that her part of Unit 25 was going to be the Scarsdale of Rio Rancho (A. 2255-56).

Monaco, an ATC tour manager, said he instructed airline pilots not to show Rio Rancho from the air (A. 2339).

Davis said a Rio Rancho salesman told him his multiple dwelling was next to be developed (A. 2558, 2560, 2581).

Mohammed said she was told her lot was on the golf course (A. 2602).

Bonavisa said she was told her commercial lots would soon double in value (A. 2759).

Fox said he was told by a team captain at a dinner party that the sales contract could not be shown to a lawyer (A. 2821-22).

Greenberg said her salesman promised that her lots were "luxury housing lots" (A. 1742, 1746-47).

Masone, an ATC salesman, said that the ATC tours stayed in downtown Albuquerque because the salesmen did not want the purchasers to see Rio Rancho. Masone also testified that salesmen were instructed to discourage purchasers from renting cars because the salesmen also did not want them to see downtown Albuquerque (A. 2154).

Linda Davis, a Rio Rancho employee, said she was told to bring the tours up the east side of the river and never to take Coors Boulevard which ran through the west mesa (A. 2967-71).

McCorkle, a Rio Rancho employee, said purchasers were given a description of Rio Rancho as a tiny place. Salesmen, she said, were instructed to show customers *any* lot if there were difficulty in finding the actual lot purchased. She also said arrowheads were scattered on the property (A. 3101-03, 3111, 3130-32).

Mols said his salesman told him he personally owned a commercial lot near Mols', and that a gas station was going to be built there in a year. Mols also said he was told in 1967 that Rio Rancho would be fully developed within 20 years (A. 3851-52, 3935-36).

Gusowsky said he was told at a dinner party that Rio Rancho was almost sold out and that a resale program would be instituted within five years (A. 3948, 4026-27).

Morden said he was told by a Rio Rancho salesman that his lot would be developed in three to four years and that in five to six years a shopping center would be built near his lot (A. 5673-74).

Gray claimed his dinner salesman told him that whenever he wanted to resell his lot, the company would buy it back (A. 5802, 5808, 5843-44).

ARGUMENT

POINT I

The evidence was insufficient to establish the falsity of the representations which allegedly comprised the scheme to defraud.

We know that this Court, in the ordinary case, tends to accept the jury verdict as resolving the issues against the defendants and, on the question of evidentiary sufficiency, lets it go at that. We believe, however, that major and apparent policy considerations should deter such a summary disposition and that careful analysis of the evidence is required.

This was not an ordinary fraud case. AMREP is a major public corporation. Its Rio Rancho development is of the highest quality. Its operations, throughout the fifteen year indictment period, scrupulously complied with the legal requirements of increasing state and federal regulation. Its commitment to Rio Rancho has been consistent, continuous, and costly. The defendants did not cut and run.

All the purchasers knew they were buying raw undeveloped land, knew of their exchange right and cancellation privilege, knew that their purchase contracts could not be modified orally, even by agents of the seller, and knew also, if they read their property reports, that a general resale market could not be expected.

No contractual promise was ever broken by the defendants.

Most of the purchasers (70% of those who testified for the prosecution) visited Rio Rancho before confirming their purchase. They saw their land. They saw Rio Rancho and Albuquerque, and they saw the relationship of one to the other. For five days, they were free to see what they wanted to see and to ask what they wanted to ask. They were able to compare the reality of their purchase with whatever it had been represented to be.

The prosecution conceded the quality of Rio Rancho as a community. It did not contest the defendants' continuous dedication to further quality development.

This case bears no resemblance to other instances where land merchants were charged and convicted of fraud, *e.g.*, defendants who sold subdivided property as investment in oil lands when there was no reason to believe there was any oil (*Mansfield v. United States*,

155 F.2d 952 [5th Cir. 1946] and *United States v. Earnhardt*, 153 F.2d 472 [7th Cir. 1946]); developers who falsely described the condition of the land or falsely represented proximity to other places (*Lustiger v. United States*, 386 F.2d 132 [9th Cir. 1967], *cert. denied*, 390 U.S. 951 (1968); *Hoffmann v. United States*, 353 F.2d 188 [10th Cir. 1965]; *Dysart v. United States*, 17 F.2d 769 [5th Cir. 1927]); developers who sold land which was under water without disclosure (*Chambers v. United States*, 237 F. 513 [8th Cir. 1916]); and developers who falsely represented their ownership of lands for sale (*Sparrow v. United States*, 402 F.2d 826 [10th Cir. 1968]); *Hoffmann v. United States*, *supra*; *Armstrong v. United States*, 65 F.2d 853 [10th Cir. 1933]; *Gridley v. United States*, 44 F.2d 716 [6th Cir. 1930]; *Alford v. United States*, 41 F.2d 157 [9th Cir. 1930], *rev'd on other grounds*, 282 U.S. 687 [1931]).

The prosecution recognized the uniqueness of this case. The indictment limited the alleged victims to those persons who had purchased Rio Rancho land as an investment (A. 12). The prosecution later acknowledged this limitation in writing by conceding that fraud was not charged in connection with purchasers who bought a single residential lot with the intention of ultimately moving to Rio Rancho (A. 9597). Similar disclaimers were made orally during both its opening and closing statements (A. 201-202, 7546-47).

By this definition, the clear inference is that this allegedly massive investment fraud at worst affected less than 20% of Rio Rancho's 42,000 landowners. Thus, 57% of the 42,000 purchasers bought only a single residential lot. Another 26% purchased only two residential lots. Only 16% purchased more than two lots and thereby evidenced that they might be purchasing for reasons other than personal or family relocation.

The purchasers who testified for the prosecution said they had been misled. The purchasers who testified for the defense said they had not been misled. Yet all of the purchaser witnesses had seen, heard, and read the very same films, oral presentation, and promotional brochures.

Not one of the purchaser witnesses, prosecution or defense, said they had been misled as to the nature and quality of Rio Rancho as a community development and as a place to live or retire. Moreover, a number of the prosecution's witnesses were forced to admit that they had bought in the first instance precisely with a view towards living at Rio Rancho. It was only later, as their personal circumstances changed, that their minds changed also (A. 569-70, 593, 1669, 1697, 1698, 1896-97, 2592-93, 2682-83, 2787, 2916).*

The ambivalence and disparity of the purchaser testimony raises a substantial question in itself as to whether reasonable men could find beyond a reasonable doubt that the defendants' authorized sales program, viewed as a whole, was designed and calculated to defraud, and possessed the inherent capacity to do so.

There is evidence that the prosecution itself recognized the failure of its evidence to establish the pervasive scheme which the indictment alleged. Six weeks into the trial, the prosecution requested and received a two-day recess to think through its case (A. 5143-5146). It rested almost immediately thereafter. In the end, this case, which originally challenged virtually every aspect of Rio Rancho as a sham and a fraud, was reduced to a

* The prosecutor's selection of purchaser witnesses is intriguing. 30% of their witnesses owned six or more lots at Rio Rancho. Yet less than 1.5% of all purchasers owned that much land. The prosecution clearly picked those witnesses who best supported their claim of investment fraud. But the prosecution witnesses did not represent the class.

charge that these defendants, over fifteen years, had cheated a rather small percentage of their customers, not by contract or official property report, but by two representations of opinion. One was that Rio Rancho land was a good investment as well as a good place to live. The other was that Albuquerque could grow "only" to its northwest towards and to Rio Rancho.

These limited charges also were not proved, even by civil standards. Neither representation was shown to be false. Substantial evidence supported both and evidence of bad faith was non-existent.*

A. The Investment Theme

The prosecution limited its allegation of a common scheme to those films, speeches, and brochures, the use of which was authorized by AMREP and known to the individual defendants. These materials promoted Rio Rancho as a good place to live or retire, and as a good investment. In a civil context, at least one federal court has found that the primary emphasis of these materials was on the development of a residential community and not on promoting a financial investment. In *Davis v. Rio Rancho Estates, Inc.*, 401 F. Supp. 1045, 1049-1050 (S.D.N.Y. 1975), Judge Brieant held:

"Although the two themes are interwoven throughout the brochures, defendants' promotional materials, fairly read, place more emphasis on development of a residential community than on purchase as an investment. It is inaccurate to say this

* The guilty verdict was general. Since each specification of fraud was submitted as sufficient in isolation to justify conviction, a finding of insufficiency as to either would require reversal. See, e.g., *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976). Insufficiency as to both specifications would require dismissal.

development was being promoted as a pure investment, as opposed to a residential development which may, incidentally, be also a good investment."

The prosecution, however, in its attempt to prove a case, refused to view the sales presentation as a whole, and instead fragmented that presentation, conceded the accuracy of those portions which dealt with Rio Rancho as a place to live, and argued that the defendants committed fraud by stating that the purchase of Rio Rancho land was also a good investment (A. 201-202, 7548-49).

The prosecution offered no evidence to prove what it would consider a "good investment" for the purpose of this criminal fraud case. It simply argued that Rio Rancho land could not be a "good investment" because no general resale market had developed by the 1970's. In essence, the prosecution argued that relatively short-term liquidity is the appropriate test of whether subdivided real estate is a worthwhile investment (A. 1120, 7550).

The prosecution's definition runs counter to ordinary experience. The word "investment" historically has implied the commitment of capital for long-term appreciation and ultimate realization on appreciated value. This is especially true with regard to real estate. While it is possible to speculate in real estate, an investment in real estate traditionally has been considered illiquid and long-term.

There are many fraud cases, including land fraud cases, where the lack of investment value could be inferred from the nature of the commodity. Stock in a shell corporation is not a good investment. Swampland, rock-face, desert without water, all are not good investments. But Rio Rancho was not a shell and its land was not

barren. It was prime land, capable of development, planned for development, developed successfully in response to increasing demand, and contiguous. By every witness' oath, Rio Rancho comprised perhaps the choicest contiguous acreage anywhere in the Albuquerque area (A. 5661-64, 4671-72, 6474, 7167-71).

A lack of investment value might also be inferred from evidence that the commodity had not appreciated in value over the years. In this case, however, every witness acknowledged that Rio Rancho land had appreciated substantially in value over fifteen years. County taxes increased throughout the period. A bank, which in 1961 would not lend mortgage money, had, by 1975, invested \$14 million of mortgage money in Rio Rancho homes. These mortgage loans ran to 95% of cost, a remarkable show of financial confidence.

A lack of investment value might also be inferred from evidence of realized loss. The prosecution produced only two witnesses who realized loss on their investment.

Clymer purchased her land in 1962 for the purpose of relocation. She did not move however, and, in 1975, sold her lot at the Rocky Mountain auction for \$500. She had paid about \$1,000 for her property, including interest (A. 5383-84, 5385, 5387-90, 5397-98).

Kaufman also sold his property at the Rocky Mountain auction. He admitted that he had been happy with his land, which he intended to give to his daughter, until he was influenced to sell by adverse publicity emanating from the FTC complaint (A. 5328-29, 5335, 5347, 5350-52).

Two of the prosecution's witnesses, Mols and James, made money on their property (A. 3823-25, 3983), and another, Bonavisa, was about to make money when the indictment was filed (A. 2790-91). All of the defense

purchasers testified to financial gain, realized or incipient. One, Mellenbrook, recognized a 100% gain in three years by the simple expedient of placing a "For Sale" sign on her undeveloped lots. Mellenbrook then lent her sign to a friend, who was equally successful (A. 6920-25).

A lack of investment value might also be inferred from evidence of inevitable loss. The prosecution offered no evidence of inevitable loss. No appraiser, realtor, or other expert was called to testify to inevitable loss or even to an absence of present value. The prosecution did call realtors as witnesses, but these questions were not asked.

In sum, the *only* evidence which the prosecution offered to prove falsity was (a) that 690 purchasers had attempted to sell their property through a multiple-listing service provided by Albuquerque's Board of Realtors, (b) that only 20 were successful, and (c) that certain parcels had been auctioned at distress prices after the FTC had filed a civil fraud complaint against AMREP and Rio Rancho.*

Even this evidence was inconclusive, assuming its relevance. 400 of the multiple-listing accounts had been solicited by a single broker, Paul Heinz. There was no evidence of the sales price at which the properties were listed. There was no evidence of the price at which 20 properties had sold. Williams, the realtor who

* We believe it was error to receive evidence of the auction. The FTC complaint was not and could not be placed before the jury for obvious reasons. The auction therefore was not subject to truthful explanation (A. 5188-90). The prosecution knew the circumstances, but argued probative value in any event. Moreover, the witness who testified about the auction lacked personal knowledge and therefore was immune from cross-examination as to its details.

testified to multiple-listing, did not know these facts, and the prosecution did nothing to fill the void (A. 5224-25, 5250-5254, 5274-79).

Probative value was diluted further by testimony that multiple-listing did not require or generate any efforts to sell. Multiple-listing amounted to nothing more than the storage of property descriptions in various realtors' file cabinets. Given the additional fact that the land was subject to sale for only a small commission, the inference, and some of the evidence, was that in fact no efforts were made to sell the land (A. 5280-81, 5313).

The auction evidence was equally without detail. There was no evidence of the prices asked by the 1,400 purchasers who offered their properties. The properties moreover were listed only because of a nationwide solicitation by Rocky Mountain, the auctioneer. There was no evidence of how the auction was advertised, although it was proved that no more than two dozen prospective purchasers attended, most of them local Albuquerque builders (A. 5147-49, 5154-55, 5167-68, 5329).

Viewed most favorably to the prosecution, this evidence established nothing more than the absence of a general sub-market for Rio Rancho land as long as Rio Rancho was not sold out. There was no evidence that purchasers were ever promised such a sub-market. Only one of the many purchaser witnesses testified to a promise of immediate liquidity, and that purchaser, Seder, retracted his testimony on cross-examination (A. 1579-81). A few salesmen, acting without AMREP authorization and contrary to its specific announced policy, did represent privately that a resale office would be opened. But even these unauthorized and prohibited representations included the caveat that this would not happen until Rio Rancho itself was sold out (A. 792-93, 1448, 1515, 1983-89, 2113, 3460-64, 3582-83).

There is no merit in any event to the prosecution's operative premise that evidence of relatively short-term illiquidity, in and of itself, established the falsity of the good investment representation. This premise indeed runs directly contrary to the thinking of responsible state agencies which concluded that the absence of liquidity in this case did not mean that an investment representation was false. Both New Jersey and New York allowed the sale of Rio Rancho land as an investment, while at the same time requiring specific written disclaimers of liquidity and ready resale (A. 10807, 10838). Both states knew that Rio Rancho land had been sold in subdivided lots since 1961. Both states knew that a resale market had not developed. Yet both states allowed its sale for investment as well as for relocation. Surely this could not have been the case if the state regulators believed that the absence of short-term liquidity meant that Rio Rancho land was a bad investment.*

It is not enough to say that the issue of falsity on this issue was presented to the jury and decided against the defendants. The question is not whether the jury was right or wrong on the evidence it heard. The question is whether, as a matter of law, the jury was given sufficient evidence to decide the issue at all.

We believe and submit that the jury was not given sufficient evidence to decide the question. There was no

* Indeed, the provisions of the recently enacted Tax Reform Act of 1976, CCH, Tax Reform Act of 1976—Law and Explanation (1976), recognize that the value of property can increase even though no market sale has or could have taken place. Thus the amendments to the Estate and Gift Tax Laws adopt a so-called "fresh start" rule which assumes that an increase in value of property occurs at a uniform rate throughout the period in which property is held regardless and quite aside from any considerations of whether the property could or could not have been sold during that period. CCH Tax Reform Act, ¶ 423.

evidence that the land was inherently without value. There was no evidence that the value of the land had not appreciated. There was no material evidence of realized loss. There was no evidence of inevitable loss. The burden of proving falsity beyond a reasonable doubt was not carried. The conviction should be reversed for this reason alone.

B. Direction of Growth

The proof also was insufficient to establish the falsity of defendants' statement that Albuquerque, when it expanded as expected, would grow through the northwest triangle to Rio Rancho. While two witnesses originally believed in 1964 and 1966 that Albuquerque's expected growth could be absorbed by in-fill within existing city limits, increased density, and vacant land in its *north-east* quadrant, events proved them wrong. In-fill did not occur. Density did not increase. The vacant north-east land absorbed less than 70,000 additional residents. On a percentage basis, growth between 1965 and 1975 was greater in the northwest triangle than elsewhere (A. 4710-15, 4722-24, 6488, 6956, 6479-81).

The defendants erred only in accepting the unanimous opinion that Albuquerque's population would triple or quadruple, from 240,000 in 1964, to between 640,000 and 820,000, by 1985. This projection has not yet worked out. Beginning in the early 1970's, Albuquerque began to experience almost zero population growth, although, ironically, population growth appeared to have begun again by the time of the trial (A. 4721-22, 6481).

Albuquerque did not grow as everyone expected, and today is a city of only 320,000. Yet the northeast now is virtually full, and expansion in the northwest triangle

is booming. Graham, the president of one of Albuquerque's largest banks, testified that its land investment program shifted to the northwest triangle in 1976, that its first northwest venture, Taylor Ranch (situated two miles southeast of Rio Rancho), is succeeding far beyond even optimistic expectations, and that, in his view and in the view of those builders with whom he invests, Albuquerque's future expansion must take place in the northwest triangle (A. 6482-89).

The defendants were not wrong about the direction of Albuquerque's growth. Like everyone else, they turned out to be wrong about the rate of Albuquerque's growth.

Falsity cannot be based upon the fact that Albuquerque's rate of growth, as opposed to its direction of growth, has not yet turned out as predicted. The evidence established a conclusive, rational, and honest basis for the prediction. Everyone agreed with it. Even Avellanet, who was more conservative than most, was certain in 1966 that Albuquerque's population would triple by 1985 to over 600,000 (GX 66; A. 10061).

Now, in hindsight, it might be said that the defendants were mistaken in expecting a population explosion which has not yet occurred. But if that unanimous 1965 projection is met by 1985, the record facts establish that the great majority of those new residents can only live in the northwest triangle in which Rio Rancho is located.

The force of the evidence as a whole may well explain the prosecution's almost total reliance upon the word "only" as used at times in connection with statements as to the direction of Albuquerque's growth.

A criminal fraud conviction should not be allowed to stand upon such rigid semanticism. If the defendants had

said that Albuquerque "must" grow to the northwest, falsity could not even be claimed. There was no evidence that the defendants meant anything more than this. There certainly was no evidence that the defendants intended "only" to mean "without exception." See, *United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963); *United States v. Steinhilber*, 484 F.2d 386 (8th Cir. 1973). There was no evidence that the "only" representation was taken to mean "without exception" by any purchaser. Cf. *Phillips v. United States*, 356 F.2d 297 (9th Cir. 1965), *cert. denied*, 384 U.S. 952 (1966).

The falsity of this second statement also was not proved. The conviction should be reversed.

POINT II

There was no evidence to establish bad faith on the part of any defendant, including Carity and Daniel Friedman.

Even persuasive proof that the defendants were wrong in their two predictions would not establish fraud in itself. There would remain the burden of establishing that the defendants *knew* they were wrong. Compelling evidence of individual bad faith is the essential element of criminal fraud.

The prosecution did not lack the resources to prove bad faith. The grand jury investigation took two years. Countless thousands of documents were obtained and examined. It is not too much to say that the fifteen year history of MREP and Rio Rancho was examined to the finest detail.

The prosecution also had unlimited access to officers and employees of the companies, some of whom were

corporate insiders who dealt with the individual defendants, including Carity and Daniel Friedman, on a day to day basis.

Surely one would expect that if the individual defendants, including Carity and Daniel Friedman, did not honestly believe they were right, and in fact were engaged in fraud, at some time over a fifteen year period they would have communicated or recorded their lack of belief within their company. Yet every insider witness, some of whom were immunized, failed to provide any evidence of that sort. Instead these *prosecution* witnesses testified not only to their own personal good faith belief in Rio Rancho, but to the complete good faith and honesty of the individual defendants (A. 1087-88, 1102-04, 1325-27, 3619-22, 3644-46).

Nor was any evidence of bad faith forthcoming from any of the thousands of corporate documents in the prosecution's possession. If Carity and Daniel Friedman were acting in bad faith, it was an unusually well-kept secret.

This was, in short, a case where the testimony of the prosecution's own witnesses and its other evidence not only failed even to suggest bad faith on the defendants' part, but was flatly contrary to any such fact or inference.

The record also was bare of any other of the indicia of bad faith often found in fraud cases. No documents were destroyed or fabricated. There was no evidence that state or federal agencies had been misled or denied full disclosure in any respect. Finally, and perhaps most significantly in a case like this, the defendants did not milk Rio Rancho land and then abandon it. The proceeds of the land sales were not divided among them individually; they were ploughed back into Rio Rancho with a concern for quality development which was not even disputed.

There just was no evidence that the defendants did not honestly believe what they were saying.

A. Growth to the Northwest

The prosecution presented evidence from which the jury could have found that some of the defendants knew that in 1965 and 1966 other persons, Carruthers and Avellanet, did not totally share their opinion that Albuquerque was destined to grow to the northwest towards Rio Rancho.

The prosecution argued that knowledge of these contrary opinions established that the defendants' different view was held in bad faith. But the existence and knowledge of a contrary opinion is not sufficient in and of itself to establish bad faith in this or any other case, absent evidence that the defendants' view had no basis in fact. Put another way, the defendants' knowledge of a contrary opinion as to the direction of Albuquerque's growth could evidence fraud in and of itself only if the other evidence in the case established the absence of any rational basis for honest disagreement on their part. *Reilly v. Pinkus*, 338 U.S. 269, 276 (1949); *American School v. McAnnulty*, 187 U.S. 94 (1902); *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

The prosecution did not establish the absence of a rational basis for disagreement. The West Side Association, an organization of Albuquerque civic leaders, predicted tremendous growth in the northwest triangle, with a population influx of 250,000 by 1985. This prediction was contained in "West Side Story", a film which the prosecution introduced on its own case. And, on the defense case, it was shown that Yguado had written as early as 1963 that Albuquerque physically could only grow to the west and northwest, and that this growth would take place in the northwest mesa where Rio Rancho was located. These opinions, which were essentially

identical to the defendants', were grounded on a "sound factual and historical basis." *Marx v. Computer Sciences Corporation*, 507 F.2d 485, 489-490 (9th Cir. 1974); *G & M, Inc. v. Newbern*, 488 F.2d 742, 745-746 (9th Cir. 1973).

The prosecution's own evidence established that the two opinions, upon which it based its case of falsity, were themselves wrong. Carruthers, who prepared the Land Use Plan in 1964, admitted that he had been wrong. Population density had not increased, as Carruthers had predicted, but instead had decreased. Vacant inner city land had not filled in, as Carruthers had hoped. The vacant northeast land, which Carruthers had predicted could absorb more than 400,000 new residents, had absorbed less than 70,000 by 1975, and, as Carruthers also admitted, had gone "about as far as it could go" (A. 4710-15, 4724, 4679).

Avellanet had predicted in 1966 that 400,000 additional people could be accommodated in northeast Albuquerque alone. He relied upon an automobile view and an offhand prediction of increased density. It is not surprising that his prediction of northeast capacity was proved to have been off by more than 330,000 people.

However, the question is not who was right and who was wrong. The question is whether the prosecution proved the defendants were acting dishonestly and in bad faith in predicting that Albuquerque would grow through the northwest triangle to Rio Rancho. The burden was to prove bad faith by direct evidence or by evidence that the defendants' opinion had no rational basis in fact. No such evidence was forthcoming. Bad faith was not proved. For this reason, even if the defendants' prediction was wrong, there was no fraud.

B. Good Investment

Short-term illiquidity was the only evidence offered to establish that Rio Rancho land was not a good invest-

ment. It is for this Court to decide whether reasonable men—the jury—could conclude from this alone that the defendants' statement that Rio Rancho land was a good investment was "false" on an objective basis.

However, objective falsity does not establish fraud. Bad faith must also be proved. And, as with the direction of growth issue, the fact that reasonable men might reach a conclusion contrary to the defendants would not, in and of itself, establish bad faith. Under the applicable standard, bad faith would be established only if there could be no rational disagreement with the prosecution's idea that relatively short-term illiquidity in subdivided real estate establishes that it is a bad investment.

Absent evidence of such a universal acceptance of the prosecution's theory, the defendants' knowledge of illiquidity does not establish their bad faith.

The prosecution failed to prove any such universality of opinion. It did not even try to. No expert, whether realtor, appraiser, or investment analyst, was called to give such an opinion. And the prosecution, which did call certain Albuquerque realtors, failed even to seek their view as to the value of Rio Rancho land as an investment.

It was proved moreover, again on the prosecution's own case, and without dispute, that reasonable and presumably qualified state regulators did not agree with the theory that illiquidity meant that Rio Rancho land was a bad investment. Both New York and New Jersey allowed the defendants to sell their land as a good investment while at the same time insisting upon a written disclaimer of liquidity. Obviously those states did not share the prosecution's belief that illiquidity was conclusive proof of a bad real estate investment.

In the end, it was the prosecution's burden to prove a universality of opinion in this regard. As we have said, the prosecution did not, and did not even try to.

POINT III

No evidence connected Daniel Friedman with the evidence of contrary opinion as to Albuquerque's growth. His conviction must be reversed for this reason alone.

There was no evidence that Daniel Friedman ever saw Avellanet's 1966 report to Rio Rancho or Carruthers' 1964 Land Use Plan. There was no other evidence that Daniel Friedman ever knew of any contrary opinion as to the expected direction of Albuquerque's growth, or that Daniel Friedman did not honestly believe in AMREP's opinion of northwest growth.

There simply was nothing to establish bad faith on Daniel Friedman's part in this regard.

Since two specifications of fraud were submitted to the jury, and since the verdict was general, Daniel Friedman's conviction must be reversed. *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

POINT IV

The Court erroneously prohibited proper argument on the issue of regulatory approval as relevant to good faith.

For reasons set forth at length in co-counsel's brief, POINT I, it is clear that State regulation of defendants' land sales differed in material respects from that type of SEC regulation with which this Court is familiar.

The SEC does not investigate the truth or falsity of a prospectus filed by an issuer. The State agencies

which regulated defendants do investigate and are required by law to do so. Moreover, there was ample proof in this case that such investigation was conducted. Dinner parties were monitored by State investigators, and State officials actually visited Rio Rancho where they were able to compare the representations made in Rio Rancho's literature with the actuality of the land itself. There was also evidence that State regulatory officials requested changes in Rio Rancho's sales materials whenever they believed that such changes were necessary to protect land purchasers. Finally, many corporate employees called by the prosecution testified that they believed that State *approval* of all sales material had been obtained.

State law required not only regulation, but substantial verification. All the evidence demonstrated a diligence by State officials in carrying out their statutory responsibilities. In the face of that record, there was substantial support for defendants' claim that their standard sales program and its materials had been approved by the State. At the very least, the evidence was more than sufficient to justify a good faith belief by the defendants that such approval had been obtained. And that good faith belief was potent, vital, and crucial evidence of the defendants' good faith overall, which, of course, is a total and complete defense to a charge of mail fraud.

Nevertheless, the court refused to permit defense counsel to argue that the defendants believed that the sales program and literature had been approved, and that this belief evidenced their good faith and negated an intent to defraud. The court also refused to instruct the jury to this effect, although specifically requested to do so (A. 8250):

"Evidence that defendants had knowledge that inspectors from the State of New York made in-

spections at Rio Rancho, attended dinner parties without prior announcements and made or requested changes to be made in advertising are all circumstances which you should consider in determining whether defendants believed that the review of advertising material by the state agencies constituted a determination by those agencies of the lawfulness of the representations made in the advertising."

These rulings grievously prejudiced the defense on the crucial issue of good faith. A defendant should be entitled to full latitude in establishing his defense, and the defense of good faith in a fraud case is one with respect to which the greatest liberality should be permitted. The court's action therefore severely impaired the defendants' right to a fair trial. A reversal is required.

POINT V

Massive prejudicial evidence of diverse and idiosyncratic sales techniques was improperly received purportedly on the issue of defendants' criminal intent. A new trial therefore is required.

The thrust of the prosecution's case was that the required commonality of fraudulent conduct was established by evidence of the uniform, common, and standardized sales presentation contained in AMREP's brochures, films, and formal dinner speech. This posture was necessary for the prosecution if it were to connect the alleged common misrepresentations with particular victim witnesses without showing that a particular victim had heard a specific speech or seen a specific brochure (A. 268-69, 887, 1421-22, 1615, 1945-47, 1975, 2604-05, 2700-01, 3386-90, 4519, 4529-4531). It was also essential if the prosecutors were to connect each defendant to a common scheme, since it was only the content of the standard

uniform sales presentation which was arguably shown to be known to each defendant.

The prosecution buttressed this basic position by offering evidence to prove that no deviation was permitted from the standardized presentations (A. 887). This allowed the prosecution to claim that any defendant who attended *any* sales dinner was chargeable with knowledge as to what happened at *all* sales dinners.

Having urged commonality to suit its own purpose, the prosecution then flooded the record with evidence of diverse, disparate and idiosyncratic sales conduct. This evidence is described in the statement of facts, *supra*, pp. 18-19, and in the appendix (A. 9608a). This evidence was not probative of the common standardized scheme which the prosecution urged as the basis for conviction. It was therefore admissible, if at all, only on the issue of fraudulent intent. However, since none of this uncommon and idiosyncratic conduct was shown to have been known to or authorized by the defendants, and indeed was specifically prohibited in large part, it was not probative on that issue and should not have been received.

Specific fraudulent intent, *mens rea*, is personal. It must be proved by evidence of a defendant's own conduct or by his knowledge of conduct by others which has either been authorized by the defendant or is acquiesced in after knowledge. Neither fraudulent intent, nor evidence of fraudulent intent, may be imputed. The Supreme Court said in *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943):

"Without the knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal."

See also, *Ingram v. United States*, 360 U.S. 672 (1959); *Barrett v. United States*, 33 F.2d 115, 116 (8th Cir. 1929).

This evidence of uncommon conduct was extremely prejudicial. This was especially true with respect to two items of evidence on which the prosecution heavily relied in its closing argument. The first was GX 315, a script for a dinner party speech prepared by one Lou Koniecki, who never even testified.

The Koniecki script, at best, was used for four months in 1965, and only in New York (A. 853-854). There was no evidence that any purchaser ever heard it or that any sales resulted from it. Its contents were substantially different from the standard AMREP script which quickly replaced it. It was therefore clearly irrelevant to the prosecution's theory of commonality which, as has been indicated, was designed to avoid questions of authentication and relevance.

The prosecutor read from the idiosyncratic Koniecki script early in her summation. The purpose was to prove the defendants' scheme had promised short-term liquidity (A. 7520-7522):

"This is a script 315, on page 11."

'The city is now ready to come into Rio Rancho Estates.'

"315 was a script that was used in 1965."

'The city is now ready to come into Rio Rancho Estates. Now we are ready for Albuquerque. Albuquerque is ready to fall right into Rio Rancho.'

* * * * *

"The script goes on to say—and this is 315 and it is used in 1965—'your investment has resale value, because I can tell you right now, 18 months from today you will not be able to buy it for less because we will have sold it all out. People like yourselves will be in the resale market.'"

No other AMREP speech ever contained such statements.

The prejudice to defendants resulting from the use of the Koniecki script was compounded ten-fold by its use of GX 669, which purported to record one Sid Hollander conducting a training session of Denver salesmen. Hollander also never appeared as a witness. The circumstances of the session were never proved and could not be cross-examined. There was no evidence that Hollander's presentation was authorized, nor was there evidence that any defendant ever heard the tape recording, a fact which the prosecution itself conceded (A. 7556).

"There is no evidence that Chester Carity listened to the tape of Sid Hollander, and Sid Hollander did conduct a training session, and you have that tape in front of you."

The prosecutor nonetheless began her summation with the Hollander tape, ended her summation with the Hollander tape, and referred to the Hollander tape throughout. After reference to the Hollander tape, the prosecution said (A. 7508):

"I urge you throughout, to keep in mind that that kind of evidence is terribly probative of what went on in this case and *what these defendants really intended* in the sale of their land."

There was no evidence that "these defendants" even knew what Hollander had said.

The prosecutor closed her summation on the same theme (A. 7624):

"[J]ust let me leave you with this one quote from Mr. Hollander, and this on his training of the salesmen, and *this is what this case is about*.

"Remember the reference to the Green Bay Packers? Now let's talk about C & A Realty. 'These people who come to our party versus you as the Green Bay Packers, we serve them with an organized offense against a disorganized defense. We could kill 'em. We could walk all over them and we do—and we do.'"

Since the prosecution had insisted that a common scheme was proved by its evidence of standardization without deviation, it was error to allow the prosecution to flood the record with evidence of uncommo: , unauthorized, and deviant conduct, and tell the jury finally that it was *this* evidence which proved "what these defendants really intended * * *" (A. 7508), and which demonstrated "what this case is about."

Moreover, on the now completed record, it appears that the prosecution deliberately introduced the evidence in question knowing that it lacked proof to connect the evidence to the defendants, and especially to the individual defendants. As Judge Hays said in *United States v. Branker*, 395 F.2d 881, 889 (2d Cir. 1968):

"Since the testimony of Mrs. Neely provided no surprises, counsel for the government must surely have known in advance of trial that the chances of proving the conspiracy charged in the indictment were very slim. Yet the conspiracy count provided the only justification for the joinder of the eight defendants. If the prejudice of joint trial is to be eliminated without the waste of time and energy which results from a joinder which is declared improper in the midst of trial, or, as here, on appeal, we must rely on the responsibility and good judgment of the prosecutors."

See also, *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965).

A new trial is required in the circumstances. The defendants' various motions for severance should have been granted (A. 9608a). The evidence of unknown, unauthorized, and prohibited conduct should have been excluded.

POINT VI

The trial court's instructions substantially prejudiced these defendants by inadequately and incorrectly presenting to the jury the crucial issues in this unusual and complex case.

A. Corporate Criminal Responsibility

Substantial evidence was received of unauthorized and prohibited conduct and statements by ATC and Rio Rancho employees which were never shown to have been brought to the knowledge or attention of AMREP or the individual defendants, or, for that matter, of Rio Rancho and ATC as corporate entities.

The prosecution argued that this evidence established the criminality of defendants Rio Rancho and ATC, and therefore also established the criminality of AMREP and the individual defendants as co-schemers.

Whatever policy considerations may justify the imputation of criminality to a *corporation* on the basis of unauthorized employee conduct, it violates every fundamental principle of our system of jurisprudence to use that fiction to impute vicarious criminal liability to individual corporate officers as well.

Guilt is personal, and guilty knowledge is personal also. The prosecution's domino theory of imputing vicarious criminality, first to a corporation, and then to individual officers, does violence to even the broadest concept of co-schemer liability in any case, much less one

which supposedly is criminal. It simply cannot be sanctioned. See, e.g., *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 384, n.19 (9th Cir. 1957).

It was wrong to expose these individual defendants to a conviction based upon the prosecution's all-encompassing theory of imputed criminal liability. This error, moreover, was compounded by an incorrect and misleading instruction on vicarious corporate criminality in itself.

It obviously was vital for the court to give clear, adequate, and correct instructions on the standard to be applied in assessing the criminal liability of Rio Rancho and ATC for the acts of their employees. The defendants requested that the court instruct the jury that the corporations could not be bound criminally by these acts of their employees *unless the employees first were proved guilty of fraud* (Request No. 14; A. 8210). The court refused to give this instruction and compounded that error with an instruction which completely diverted the jury's attention from this basic threshold issue. The court charged (A. 7973):

"A corporation is held responsible for the acts and statements of such persons when such acts and statements are performed or made within the scope of their express or *apparent authority*, and this responsibility exists even though such statements or actions are in violation of law." [Emphasis added]

The court then defined "apparent authority" as (A. 7973):

"... the power *an outsider* would normally assume a person would possess judging from his position and the general scope of his known functions." [Emphasis added]

This instruction was error. Imputation of criminality to a corporation, based upon the unauthorized conduct

of its employees, is permissible only if it is first proved that the employee himself is guilty of the crime. Yet the court's "apparent authority" charge made no mention of the employees' state of mind and instead focused the jury's attention on the state of mind of third parties, an essentially irrelevant issue.

The proper question was whether the employee, whose alleged criminality is to be imputed to the corporation, possessed the requisite fraudulent knowledge and intent, and not what "an outsider" perceived.* See, e.g., *United States v. Carter*, 311 F.2d 934 (6th Cir. 1963); *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960). Absent criminal knowledge and intent on the part of the employee, an issue which the jury was never asked to decide, the corporate defendant cannot be bound criminally.

The necessity for establishing the agent's culpability or *mens rea* is illustrated by a simple example drawn from the trial record. There was evidence that some salesmen had told purchasers that Rio Rancho would soon be sold out, at which time a resale office would be opened. There was no proof that any individual defendant or AMREP knew of or authorized these statements which, in fact, were prohibited. Moreover, there was no proof that any salesmen, in making this unauthorized statement, thought it was false. Indeed the evidence showed that resale office representations ceased when the salesmen learned that AMREP had decided to purchase additional land (A. 1988). There was simply no basis to infer that salesmen knowingly and fraudulently misrepresented the future opening of a resale office. It was therefore improper to attribute criminality to the corporation based upon these resale office representations.

* An apparent authority charge is predicated upon the state of mind, i.e., reliance of the "victim". See Restatement of Agency §§ 257, 265. Such reliance, however, is not even an element of proof in criminal mail fraud cases generally.

Had the jury been clearly instructed that an employee must be guilty of all the essential elements of the offense, including criminal knowledge, before a corporation can be bound criminally, the danger of the jury imputing criminality to the corporation and in turn to the individual defendants, based upon the unauthorized and prohibited resale office representations of the salesmen, would have been eliminated.

The truth of the matter is that the prosecution, lacking other evidence, tried to prove the defendants' bad faith by this evidence of deviant and unauthorized employee conduct. For this reason, this error in the instruction was substantial. It poisoned the defendants' right to a fair trial on the central issue of good faith. A new trial is required.

B. Good Faith

In discussing the issue of good faith as a complete defense to mail fraud, the trial judge included the following (A. 7974):

"No amount of honest belief on the part of a defendant that the enterprise will ultimately succeed and that no one would suffer any loss excuses fraudulent actions."

This charge was serious error in this particular case. A basic specification of fraud was the alleged lack of a good-faith and honest belief in the defendants' statement that Rio Rancho land was a good investment, as well as a good place to live. Judge Metzner's instruction, however, effectively told the jury that defendants' honest belief in the ultimate value of Rio Rancho land was irrelevant. Precisely the opposite was true. The defendants' good or bad faith belief in ultimate value was the entire issue.

The charge also was internally inconsistent, because an honest belief on the part of a defendant that an

enterprise will succeed and that no one will suffer any loss is totally inconsistent with having a fraudulent intent. This is so because there cannot be fraudulent intent absent an intent to cause a victim permanent pecuniary injury. *United States v. Regent Office Supply*, 421 F.2d 1174 (2d Cir. 1969).

The charge, while perhaps proper in an embezzlement case where the defendant claims an intention to repay, had no place in a fraud prosecution where a specific intent to injure is a part of the basic element of fraudulent intent. The effect was to imply that a person may act in good faith and without intent to cause anyone pecuniary injury, and yet at the same time be guilty of fraud. This is not the law.

C. Illiquidity

We have argued that certain evidence of relatively short-term illiquidity was the only evidence offered by the prosecution in its effort to establish the falsity of defendants' statement that Rio Rancho land was a good investment. The defendants specifically requested an instruction "that illiquidity or lack of a ready resale market does not *in and of itself* establish that the land sold was a bad investment." (Emphasis added). This request was included in the defendants' Request No. 31, which dealt generally with the good investment representation.

The court refused to instruct on the issue of illiquidity as requested, and no similar instruction was given. If this Court now should conclude that defendants are incorrect, and that the evidence of illiquidity in this case was sufficient "in and of itself" to establish the falsity of the good investment representation, then this refusal to charge was not prejudicial. If this Court should agree with the defendants however, but should find *other* evidence sufficient in its judgment to establish

the falsity of the good investment representation, then the failure to give an instruction on the issue of illiquidity was erroneous, in that the absence of the instruction allowed a jury determination of guilt based entirely upon the evidence of illiquidity. Unless the evidence of illiquidity was sufficient in and of itself to establish falsity, the defendants deserved to have the contrary point made clear to an inexperienced lay jury which might well have convicted on the evidence of illiquidity alone.

POINT VII

The Court erred in its treatment of the grand jury testimony of the defendant Friend.

Solomon Friend joined AMREP as general counsel in 1970. In circumstances set forth more fully in POINT VIII, *infra*, Friend was named as one of the defendants in this case. During the trial, at the very close of its direct case, the prosecution offered portions of Friend's grand jury testimony against Friend only. In view of the paucity of evidence against Friend, the defendants asked that the court defer the reading of Friend's grand jury testimony until it had determined whether there was a *prima facie* case against Friend. This request was refused. Portions of Friend's grand jury testimony were read to the jury. Among other matters, Friend's grand jury testimony included his speculation that Rio Rancho, unless its rate of growth increased, would not be fully developed for more than 100 years (A. 5965-70).

The prosecution rested immediately thereafter. The case against Friend was dismissed. His grand jury testimony was struck. But the damage was done.

The court erred in refusing to defer the reading of Friend's grand jury testimony until it was determined whether Friend would remain in the case. It was evi-

dent that the evidence against Friend was thin, if not non-existent. The prosecution would not have been prejudiced by awaiting a sufficiency determination before reading Friend's testimony to the jury. Defendants expressed their willingness to allow the prosecution to reopen its case immediately and read the testimony at that time, if Friend's dismissal motion failed. The court's contrary ruling exposed the defendants to the prejudicial speculation of AMREP's own general counsel, which the jury, despite a limiting instruction, could not help but perceive as representing the opinion of all the defendants as to the future development of Rio Rancho.

POINT VIII

The prosecutor's deliberate violation of defendants' Fifth and Sixth Amendment rights during the grand jury examination of Friend requires the sanction of dismissal.

Friend was summoned to the grand jury originally as a custodian of records, and, after substantial testimony absent any target warning, was advised that he was a target of the investigation.

Friend continued to testify before the grand jury. He appeared on ten separate occasions over the six months preceding indictment. Friend consistently maintained his innocence, and urged that he could establish his innocence by disclosing matters otherwise subject to the attorney-client privilege. The prosecution, in essence, told Friend that he would be indicted unless he breached the attorney-client privilege and produced exculpatory evidence (A. 8664-67). At the inducement of the prosecution, Friend thereafter obtained a district court order allowing him to produce privileged communications. As a result, documents, which previously had been held privileged by other district judges, were turned over to the

prosecution. Privileged matters aside, Friend, who had been participating in the legal defense of the indictment prior to his target warning, also was questioned and gave testimony about legal defense activity (A. 8663-64).

This deliberate intrusion violated not only the attorney-client privilege and the rule which protects the work product of an attorney, but also the defendants' Sixth Amendment right to counsel, and requires the sanction of dismissal. *United States v. Gartner*, 518 F.2d 633 (2d Cir. 1975); *United States v. Rosner*, 485 F.2d 1213, 1228 (2d Cir. 1973); *In Re Terkel*, 256 F. Supp. 683 (S.D.N.Y. 1966); *United States v. Mitchell*, 372 F. Supp. 1239, 1245 (S.D.N.Y. 1973). See, *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972); *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964); *United States v. Pepe*, 367 F. Supp. 1365 (D. Conn. 1973); *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *United States v. DeMarco*, 401 F. Supp. 503 (C.D. Cal. 1975). See also Rule 1101(d) of the Federal Rules of Evidence, which makes it clear that all rules of privilege are applicable in grand jury proceedings.

In the *Terkel* case, the prosecution sought to compel an attorney to testify before the grand jury concerning a meeting between the attorney, his client, and a third party. The meeting was held in preparation of the client's case for trial. In deciding that the attorney's testimony could not be compelled, Judge Frankel found that "The prosecutor's secret intrusion (into this area) offends both the Fifth and Sixth Amendments." 256 F. Supp. at 685. What is particularly persuasive about Judge Frankel's determination is that it had to do, not with a violation of the attorney-client privilege, but with an attempted intrusion into a lawyer's work product. *A fortiori*, a prosecutor's intrusion which includes work product, and goes beyond that to the attorney-client privilege itself, clearly violates a defendant's constitu-

tional right to due process of law and to the effective assistance of counsel as guaranteed by the Fifth and Sixth Amendments.

In the *Mitchell* case, Judge Gagliardi found that a prosecutor's actual intrusion into an attorney's work product constituted a violation of the client's Fifth and Sixth Amendment rights. 372 F. Supp. at 1246. The intrusion in the *Mitchell* case occurred during the grand jury proceeding itself, as here. Moreover, and of a special relevance to the instant case, Judge Gagliardi refused to dismiss the indictment only because the attorney's testimony as to work product was taken before a grand jury *other* than the indicting grand jury, so that, in Judge Gagliardi's words:—"By an accident of fate Parkinson's testimony never reached the ears of the indicting Grand Jury." For this reason, and for this reason alone, Judge Gagliardi refused to find that the indictment was "tainted" and therefore refused to order its dismissal despite what he found to be:—"The Government's unfortunate and ill-advised excursion into the realm of the work product rule * * *." 372 F. Supp. at 1246.

It follows that the indictment in this case must be dismissed for constitutional reasons. The prosecution consciously and deliberately invaded areas protected by the privilege itself, as well as areas of work product. Nor did the prosecution take any steps to prevent "taint" by extracting the privileged information before a grand jury other than the indicting grand jury, as in the *Mitchell* case.

Instead, with a full awareness that it was acting at its peril, the prosecution went before Judge Duffy, and told that court that it need not concern itself with the ramifications of allowing Friend, for purposes of making out his defense, to breach both the attorney-client privilege and the councils of the defense (A.

8672-81). In so doing, the prosecution assumed full responsibility for its course of action. Certainly, as a matter of policy, the prosecution should be told in no uncertain terms that such an invasion of protected areas, especially where that conduct occurs in the grand jury itself and in flat violation of the Federal Rules of Evidence, will not be tolerated or condoned.*

POINT IX

The indictment upon which defendants were tried was returned without grand jury deliberation and in violation of defendants' constitutional right to indictment by an independent body of their peers.

The original indictment was returned on October 28, 1975. It was 42 pages long, verbose and prolix to a fault, and did not lend itself to orderly trial. The district court repeatedly asked the prosecution if it could limit the indictment in the interests of a fair and expeditious trial. The prosecution consistently refused to do so. Finally, on June 21, 1976, the district court ordered the prosecution to return on July 13, 1976, with a designation of which of the multifold issues it intended to put to trial.

The prosecution did not do so. Instead, on July 13, 1976, it reconvened the original grand jury and had it return a somewhat clearer and shortened indictment. The new indictment was delivered to defense counsel at 1:30 P.M. that afternoon.

* This is not a case like *United States v. Calandra*, 414 U.S. 338 (1974), or *Costello v. United States*, 350 U.S. 359 (1956), where the alleged illegal evidence admitted before the grand jury was seized elsewhere by an agency other than the prosecution. Here it was deliberately seized by the prosecution through the grand jury itself, and thereby perverted the grand jury itself.

There simply is no way in which the grand jury could have genuinely deliberated on the charges contained in the new indictment, some of which were new. For example, the new indictment charged that the actual development of Rio Rancho was a sham inducement designed to sell more land, and that the visitation and cancellation privilege was also a fraudulent selling device. Neither charge was contained in the original indictment. Neither was proved at trial.

New charges or old charges, our point is that the July 13, 1976 indictment could not have been the subject of any meaningful deliberation on the grand jury's part. It simply had no time to deliberate. The entire proceeding was a rubber stamp sham, orchestrated by the prosecution to evade an earlier reasonable order by the district court.

It is common knowledge that grand jurors seldom serve their historic purpose of shielding the citizen from the power of the Crown. Generally, the erosion of the grand jury process has been tolerated. But see, *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).

The procedures employed in this case clearly went too far. A grand jury which had heard no evidence since October 1975, and whose recollection of the evidence must have been dim at best, was reconvened on July 13, 1976, presented with a new charging instrument, and asked to vote. The procedure surely is without precedent in a case of this magnitude. The due process violation is clear.

For this reason also, the convictions should be reversed, and the indictment dismissed.

POINT X

Defendants Chester Carity and Daniel Friedman respectfully join in the points asserted by the other appellants.

CONCLUSION

The indictment should be dismissed since the prosecution failed to prove a scheme to defraud. A new trial should be ordered, alternatively, since the prosecution failed to prove at least one of the two specifications of fraud which were submitted to the jury, and since trial error deprived the defendants of a fair trial. The indictment should be dismissed in any event because of the prosecution's abuse of the grand jury system.

Dated: New York, New York
May 5, 1977

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